

RECEIVED

03-23-2018

**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN
SUPREME COURT

JOHN McADAMS,

Plaintiff-Appellant,

vs.

MARQUETTE UNIVERSITY,

Defendant- Respondent.

Appeal No.

2017AP1240

Circuit Court Case

No. 16-CV-3396

On Appeal from the Circuit Court of Milwaukee County
Circuit Court Case No. 16-CV-3396
The Honorable David A. Hansher

**BRIEF OF *AMICI CURIAE* THE WISCONSIN
ASSOCIATION OF INDEPENDENT COLLEGES AND
UNIVERSITIES**

Andrew A. Hitt, SBN 1064340
Michelle L. Dama, SBN 1041809
MICHAEL BEST & FRIEDRICH LLP
One South Pinckney Street, Suite 700
Madison, WI 53703
Phone: (608) 257-3501
Fax: (608) 283-2275
aahitt@michaelbest.com
mldama@michaelbest.com

TABLE OF CONTENTS

	Page
I. THE WISCONSIN LEGISLATIVE AND EXECUTIVE BRANCHES HAVE SET FORTH A REGULATORY FRAMEWORK THAT ENSURES PRIVATE UNIVERSITIES ARE NOT SUBJECTED TO THE WHIMS OF GOVERNMENT CONTROL; PRIVATE UNIVERSITIES AND THEIR FACULTIES GOVERN DECISIONS OF TENURE, SUSPENSION, AND DISMISSAL.	1
A. The Regulation Of Public Universities Is Explicit As Is The Independence Of Private Colleges And Universities.	2
B. The Legislature Has Utilized The Legislative Process To Benefit The Private Colleges And Universities While Respecting Their Independence.	6
C. Developing The Common Law Of Academic Freedom And Freedom Of Expression And Applying It To Both Public And Private Universities Ignores The Legislature’s Policy Choice Of Independence For Private Colleges And Universities.	9

Table of Contents (continued)

	Page
II. IGNORING THIS REGULATORY FRAMEWORK—AS SET FORTH BY THE LEGISLATIVE AND EXECUTIVE BRANCHES—WOULD LEAD TO UNINTENDED CONSEQUENCES THAT WOULD ERODE THE INDEPENDENCE OF PRIVATE UNIVERSITIES.	12
CONCLUSION.....	17

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Aicher v. Wisconsin Patients Compensation Fund</i> 2000 WI 98 237 Wis. 2d 99, 613 N.W.2d 849	9, 10
<i>Benson v. City of Madison,</i> 2017 WI 65, 376 Wis. 2d 35, 897 N.W.2d 16	2
<i>Guzman v. St. Francis Hosp. Inc.,</i> 2001 WI App 21, 240 Wis. 2d 559	9
<i>State ex rel. Kalal v. Circuit Court for Dane County,</i> 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110	2
STATUTES	
Wis. Stat. § 15.67(1)	6
Wis. Stat. § 15.675(1)(c)	6
Wis. Stat. § 16.979	7
Wis. Stat. § 36.09(1)(e)	3
Wis. Stat. § 36.09(1)(f)	3
Wis. Stat. § 36.09(1)(gm)	3, 15
Wis. Stat. § 36.09(3)(a)	3
Wis. Stat. § 36.31	7
Wis. Stat. § 39.41(5)	7
Wis. Stat. § 39.86(6)(b)(2)	5
Wis. Stat. § 39.87(2)(a)	5

Wis. Stat. § 115.297(2) - (4)	8
Wis. Stat. § 115.297(5)(c).....	8
OTHER AUTHORITIES	
Executive Orders 37, 59, 97, 147, and 270	4
Wis. Ass’n of Independent Colleges & Universities (WAICU), <i>Guide to Admissions & Financial Aid</i> 2017-18, http://read.dmtmag.com/i/856306-2017-2018-guide	15
<i>What are the Advantages of Attending a Private College?</i> , https://learn.org/articles/What_are_the_Advantages_of_Attending_a_Private_College.htm	14
https://www.insidehighered.com/news/2008/08/20/pharmacy	15
75 Fed. Reg. 66832-66975 (Oct. 29, 2010)	3, 4
U.S. Dep’t of Educ., Inst. of Educ. Sci., Nat’l Ctr. for Educ. Statistics, <i>Summary Tables, generated from Integrated Postsecondary Education Data System (IPEDS)</i> , https://nces.ed.gov/ipeds/datacenter/login.aspx?gotoReportId=8)	12, 13
U.S. Dep’t of Educ., <i>Program Integrity Questions and Answers- State Authorization</i> , https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/sa.htm	4
Wis. Admin. Code chs. UWS 3, 4 and 6.....	3
Wis. Legislative Fiscal Bureau, <i>Student Financial Aid</i> (Info. Paper 34 Jan. 2017).....	13

I. **THE WISCONSIN LEGISLATIVE AND EXECUTIVE BRANCHES HAVE SET FORTH A REGULATORY FRAMEWORK THAT ENSURES PRIVATE UNIVERSITIES ARE NOT SUBJECTED TO THE WHIMS OF GOVERNMENT CONTROL; PRIVATE UNIVERSITIES AND THEIR FACULTIES GOVERN DECISIONS OF TENURE, SUSPENSION, AND DISMISSAL.**

McAdams specifically calls on this Court to develop the common law regarding academic freedom. The Wisconsin Association of Independent Colleges and Universities (“WAICU”) asks this Court to first consider the regulatory framework that governs—or more appropriately stated—that *protects* private colleges and universities and preserves their independence.

The Wisconsin legislative and executive branches have, over the course of decades, chosen to carefully respect the independence of private colleges and universities. The legislature has protected these private institutions from government regulations that apply to public institutions, and has in some cases placed private colleges and universities on equal footing to provide them the same legislative benefits bestowed

upon public institutions.¹ Indeed, the legislature has in many instances given private colleges and universities the choice of whether to participate in certain programs. It is through this lens that WAICU asks the Court to consider the case before it and reject McAdams invitation to override the deference and independence the legislature has afforded private universities regarding contractual governance of their employees.

A. The Regulation Of Public Universities Is Explicit As Is The Independence Of Private Colleges And Universities.

This Court has long stated that the words of a statute mean something and words that are absent can also convey substantial meaning. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110; *Benson v. City of Madison*, 2017 WI 65, ¶ 32, 376 Wis. 2d 35, 897 N.W.2d 16. The Wisconsin legislature in chapter 36 of the Wisconsin Statutes has set forth a robust legislative scheme to govern public universities. For example, the following are only applicable to public universities:

¹ Of course in Wisconsin, private, nonprofit colleges and universities receive no direct operating support from Wisconsin taxpayers.

- Wis. Stat. § 36.09(1)(e) providing that the Board of Regents appoint the chancellors to the universities;
- Wis. Stat. § 36.09(1)(f) providing that Board of Regents shall delegate the administration and operation of the institutions to the chancellors;
- Wis. Stat. § 36.09(1)(gm) providing that Board of Regents cannot create any new colleges or schools at the universities unless authorized by the legislature; and
- Wis. Stat. § 36.09(3)(a) providing that the chancellors along with their faculties shall be responsible for, among other things, designing the curricula, determining academic standards, developing standards for faculty peer evaluation, and for the process of tenure.

In addition, by delegation of the legislature, the University of Wisconsin System has further promulgated administrative rules applicable to public universities regarding faculty appointments, dismissal for cause, complaints and grievances, and many others. *See* Wis. Admin. Code chs. UWS 3, 4 and 6.

Missing from this regulatory framework is any regulation of Wisconsin's private colleges and universities. In fact, not only are they free from these burdens, both the legislature and executive branch have recently acted to protect the independence of these universities. In 2010, the federal government promulgated rules relating to program integrity. *See* U.S.

Department of Education, 75 Fed. Reg. 66832-66975 (Oct. 29, 2010). These rules in part sought to ensure that all post-secondary education schools had procedures for student complaints and grievances. To ensure program integrity, states could utilize a current regulatory body, legislate a new governmental body, or it could utilize another approach to achieve the same objective.²

In 2011, the Governor promulgated Executive Order 37 and named WAICU as the official organization of nonprofit higher education to coordinate and oversee the successful oversight of student complaints that allege violations of consumer protection laws, violations of licensure, and complaints about the quality of education. The Governor has since promulgated Executive Orders 59, 97, 147, and 270 to ensure the continued independence of private colleges and universities. In 2015, the legislature codified the Governor's executive action in Wis. Stat. § 39.87 further affirming that private colleges and

² See U.S. Dep't of Education, *Program Integrity Questions and Answers-State Authorization*, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2009/sa.html>.

universities “are exempt from additional state authorization requirements as provided under the program integrity rules.”
Wis. Stat. § 39.87(2)(a).

Of course this is not first time the legislature has explicitly protected private colleges and universities. In Wis. Stat. § 39.86(6)(b)(2) relating to the distance learning authorization board, the legislature explicitly states that the distance learning program “does not grant the board responsibility or control over the operations of a postsecondary institution headquartered in this state, including with respect to curriculum, admission requirements, graduation standards, finances, student information covered by federal or state privacy laws, or governance, beyond the provisions of the agreement.” While a protection that applies to both public and private institutions, it has limited application to public universities as they are already regulated so heavily by government.

B. The Legislature Has Utilized The Legislative Process To Benefit The Private Colleges And Universities While Respecting Their Independence.

In several examples, the legislature has sought to protect private colleges and universities by explicitly affording them the opportunity to be on equal footing with public universities. For example, the legislature affords the board of trustees from an independent college or university a seat on the Higher Educational Aids Board³ alongside a member of the Board of Regents and a member from the Technical College System Board. *See* Wis. Stat. § 15.67(1). Certainly without this legislative requirement, the representation of private colleges and universities would not be guaranteed. A similar opportunity is afforded to the President of WAICU on the Distance Learning Authorization Board⁴ where the President of UW System and the President of the technical college system have legislatively mandated appointments. *See* Wis. Stat. § 15.675(1)(c). Beyond

³ The Higher Educational Aids Board is the state agency that oversees the state's student financial aid system for Wisconsin residents attending institutions of higher education.

⁴ The Distance Learning Authorization Board represents Wisconsin's higher education institutions for state authorization reciprocity agreements.

board seats, the legislature has given private colleges and universities the opportunity to benefit from specific programs, such as participating in the telecommunications networks administered by the state and the transfer of core general education credits among public and private institutions. *See Wis. Stat. §§ 16.979 and 36.31.*

Additionally, when developing programs relevant to both public and private universities, the legislature has taken an if/then approach with private universities. That is, if a private university chooses to participate in the program, then it must follow the specific rules of participation. For example, Wis. Stat. § 39.41(5) ensures that if private colleges and universities want to participate in academic excellence higher education scholarships, the institutions must follow the procedure set forth in the Wisconsin statutes.⁵ In chapter 115 of the Wisconsin statutes, the legislature sets forth how to evaluate and study education programs in Wisconsin, but again, it gives private colleges and

⁵ The academic excellence higher education scholarships provide scholarships to students with the highest grade point averages. The number of scholarships available is dependent upon school size.

universities a choice of whether to participate. Wis. Stat. § 115.297(2) - (4). Perhaps even more informative, the legislature specifically preserves the right of private colleges and universities to not participate in this study program or even be evaluated by public universities without the consent of the private college or university:

Notwithstanding sub. (3), the Wisconsin Association of Independent Colleges and Universities is not required to enter into the written agreement under that subsection. Notwithstanding sub. (2), if the Wisconsin Association of Independent Colleges and Universities does not enter into the written agreement, none of the other agencies may evaluate or study the association's education programs without the approval of the association.

Wis. Stat. § 115.297(5)(c) (emphasis added). Over many decades of legislative sessions, the legislature has repeatedly sought to protect the freedom and independence of private colleges and universities and distinguish them from their public university counterparts. It is important that these legislative choices are respected.

C. **Developing The Common Law Of Academic Freedom And Freedom Of Expression And Applying It To Both Public And Private Universities Ignores The Legislature's Policy Choice Of Independence For Private Colleges And Universities.**

“[I]t is the legislature’s function to establish the parameters of policy for Wisconsin, consistent with the changing needs of society.” *Guzman v. St. Francis Hosp. Inc.*, 2001 WI App 21, ¶ 8, 240 Wis. 2d 559, 623 N.W2d 776. Academic freedom and speech on college campuses is at the center of public discourse in America at this time. It is no doubt a very important issue, but the proper body to take up and develop the law in this area is not the courts and it is certainly not the courts when it is a private-sector employee that has a contract dispute with a private university. The Court’s only task in this case should be to interpret the contract at issue here—a task perhaps more befitting the court of appeals.

This Court has grappled with deference to existing legislative regimes before and has held that certain policy determinations must be left to the legislative process. In *Aicher v. Wisconsin Patients Compensation Fund*, the court specifically

wrestled with deferring to the legislature’s policy choices or interjecting its own policy choice in order to give children their day in court. 2000 WI 98, ¶¶ 41-54, 237 Wis. 2d 99, 613 N.W.2d 849. Despite the dissents forceful assertion that “[t]he doors of the courthouse have again been closed—this time to children” (*Id.* ¶ 86 (Crooks, J., dissenting)), the majority refused to substitute its views for that of the legislature. *Id.* ¶¶ 52, 85. The plaintiff in *Aicher* had claimed that Wis. Stat. § 893.55(1)(b) was unconstitutional because as the circuit court concluded, “the statutes gave Aicher zero days to file her action and thereby denied her an opportunity to be heard in court.” *Id.* ¶¶ 1-4. The court concluded that if it were to extend the right to a remedy here, it would effectively “eviscerate the ability of the legislature to enact any statute of repose.” *Id.* ¶ 54. While a “harsh result” as the court acknowledged, it is not the role of the court to make policy choices, which is why in the past, this Court has called upon and “strongly recommend” legislative action to address a perceived need. *Id.* ¶¶ 24, 85 (discussing the court’s call to the legislature to amend medical malpractice statute of limitations).

The legislature has specifically left such things as tenure decisions and dismissal of faculty to the private colleges and universities and their faculty. For public universities, on the other hand, the legislature has set forth a robust regulatory framework. If this Court were to heed McAdams request to develop the common law of academic freedom, it undoubtedly would begin to ignore the policy preferences made by the legislature. More unsettling, such a common law development is not without a slippery slope. Applying the First Amendment here to curtail the actions of a private university against a private employee would lead to unintended consequences. It is no stretch to think that there are organizations that could utilize a well-intended common law development in this case to argue in the future that private religious universities cannot require such things as religion classes as part of their core curriculum.

II. IGNORING THIS REGULATORY FRAMEWORK—AS SET FORTH BY THE LEGISLATIVE AND EXECUTIVE BRANCHES—WOULD LEAD TO UNINTENDED CONSEQUENCES THAT WOULD ERODE THE INDEPENDENCE OF PRIVATE UNIVERSITIES.

As addressed above, the legislative and executive branches have sought the appropriate amount of regulation of private universities that is sensitive to institutional diversity and independence, while also addressing society's needs. Through this delicate framework, private universities have been able to succeed and provide several social and economic advantages to the State of Wisconsin and its residents. Ignoring this framework is not only legally improper, but would lead to unintended, damaging economic and social consequences for the State of Wisconsin.

Wisconsin private colleges and universities serve a vital function in higher education for the State of Wisconsin. As such, they provide several economic and social benefits to the state. WAICU member institutions educate and serve about 55,000 students a year. *See* U.S. Dep't of Educ., Inst. of Educ. Sci., Nat'l Ctr. for Educ. Statistics, *Summary Tables-Fall Enrollment, 2016*,

generated from Integrated Postsecondary Education Data System (IPEDS), <https://nces.ed.gov/ipeds/datacenter/login.aspx?gotoReportId=8>) [accessed 2018] [“IPEDS Data”]. Of those students, about 22 percent are minorities. That compares to 17 percent at Wisconsin's public universities. IPEDS Data, *supra*, *Summary Tables-12-Month Enrollment, 2015-2016*. The diversity of offerings and number of students educated by these institutions not only provides enriching academic offerings for Wisconsin's students, but also translate into economic benefits to the State of Wisconsin.

For example, private universities save state taxpayers an estimated \$6.5 billion dollars in state-funded student costs. IPEDS Data, *supra*, *Summary Tables*. Indeed, over four years, the cost to state taxpayers for a single four-year degree at public institutions is \$127,368 (direct institutional subsidies plus state-funded student aid) as compared to private, nonprofit colleges and universities' students receiving an average of \$9,596 (four years of state-funded student aid only). Wis. Legislative Fiscal Bureau, *Student Financial Aid* (Info. Paper 34 Jan. 2017). This

number becomes even more impactful when you consider that “students at private nonprofit colleges and universities have a 64 percent better chance of graduating in four years than do students at Wisconsin's public universities.” *What Are the Advantages of Attending a Private College?*, https://learn.org/articles/What_are_the_Advantages_of_Attending_a_Private_College.html.

Moreover, private universities directly employ over 17,000 individuals, which results in positive economic impact to the State through increased income taxes and both direct and indirect spending. Not to mention the economic benefits from (1) spending by students and visitors to independent universities, (2) capital construction projects, and (3) the value of research, grant or community service activities. Without doubt, these economic effects are felt throughout the state.

Equally important, private colleges and universities contribute to the state through the diverse social and cultural benefits these institutions provide their communities.

Independent colleges and universities provide greater options for diverse program offerings especially in the areas of medicine,

health sciences, business, engineering, and religion. Wisconsin's private colleges and universities offer 421 undergraduate majors, 124 master's degree options, and 54 doctoral programs. Wis. Ass'n of Independent Colleges & Universities (WAICU), *Guide to Admissions & Financial Aid 2017-18*, <http://read.dmtmag.com/i/856306-2017-2018-guide>. Moreover, the independent nature of private universities affords them greater flexibility to adapt to the educational needs of the State, such as when Concordia University quickly developed a pharmacy program to address a pharmacist shortage in Wisconsin.⁶ For a public university, on the other hand, it would take years for a new program to be developed and approved. *See* Wis. Stat. § 36.09(1)(gm).

Failure to respect the regulatory framework established by the legislature would lead Wisconsin down a path of regulating our private colleges and universities. If this Court pierces the veil here, regulation of our private colleges and universities is sure to come, and regulation rarely becomes less prevalent or burdensome once it starts. This would no doubt undermine the

⁶ <https://www.insidehighered.com/news/2008/08/20/pharmacy>

ability of private universities to serve students, accomplish their missions and provide these valuable benefits, and it serves as a major concern to these vital higher education institutions and invites disruption of a system that has worked well since 1961.

McAdams' attempts to recast his contract dispute into one involving the First Amendment is without merit under the facts presented here. The record clearly shows that Marquette's Faculty Hearing Committee ("FHC") disciplined McAdams for his actions, not the viewpoints he expressed in the blog post at issue. (R.3:88-100.) In doing so, FHC emphasized faculty members' obligations to avoid harm to others – particularly students. (R.3:80.) Professors have an obligation to "take care not to cause harm, directly or indirectly, to members of the university community." (R.3:79.) Indeed, McAdams' expert witness conceded that neither academic freedom nor free speech prevent a university from disciplining a teacher when "demonstrable harm that is contrary to the academic mission of the university" is present. (R. 64:43.)

CONCLUSION

The legislative and executive branches have explicitly regulated the tenure, suspension, and dismissal procedures at public universities while preserving the independence of Wisconsin's private colleges and universities. Were this Court to develop the common law of academic freedom instead of interpreting the contract between the parties, there would be a plethora of unintended consequences that would come to fruition. This Court should reject McAdams invitation to override the deference and independence the legislature has afforded private universities regarding contractual governance of their employees.

Respectfully submitted this 20th day of March, 2018.

MICHAEL BEST & FRIEDRICH LLP

By: /s/ Andrew A. Hitt

Andrew A. Hitt, SBN 1064340

Michelle M. Dama, SBN 1041809

One South Pinckney Street, Suite 700

Madison, WI 53703

Phone: (608) 257-3501

Fax: (608) 283-2275

mldama@michaelbest.com

aahitt@michaelbest.com

*Attorneys for The Wisconsin Association of
Independent Colleges and Universities*

FORM AND LENGTH CERTIFICATION

I hereby certify that this non-party brief conforms to the Rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 2,773 words, as counted by our word processor.

Dated this 20th day of March, 2018.

MICHAEL BEST & FRIEDRICH LLP

By: /s/ Andrew A. Hitt

Andrew A. Hitt, SBN 1064340
Michelle M. Dama, SBN 1041809
One South Pinckney Street, Suite 700
Madison, WI 53703
Phone: (608) 257-3501
Fax: (608) 283-2275
aahitt@michaelbest.com
mldama@michaelbest.com

*Attorneys for The Wisconsin Association of
Independent Colleges and Universities*

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this non-party brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties of record.

Dated this 20th day of March, 2018.

MICHAEL BEST & FRIEDRICH LLP

By: /s/ Andrew A. Hitt

Andrew A. Hitt, SBN 1064340
Michelle M. Dama, SBN 1041809
One South Pinckney Street, Suite 700
Madison, WI 53703
Phone: (608) 257-3501
Fax: (608) 283-2275
aahitt@michaelbest.com
mldama@michaelbest.com

*Attorneys for The Wisconsin Association of
Independent Colleges and Universities*